IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

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| AVA SLAUGHTER, | § | |
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| Plaintiff, | § | |
| | § | |
| v. | § | CIVIL ACTION NO. H-05-3455 |
| | § | |
| JONES DAY, | § | |
| | § | |
| Defendant. | § | |
| | § | |

**DEFENDANT JONES DAY'S RESPONSE TO PLAINTIFF'S MOTION FOR NEW TRIAL AND MOTION FOR RECONSIDERATION**

Defendant Jones Day ("Jones Day" or "Defendant") files this Response to Plaintiff's Motion for New Trial and Motion for Reconsideration, and respectfully moves this Court to deny such motions.

As this case was decided upon Defendant's Motion for Summary Judgment, Plaintiff's Motions should be considered a Motion to Alter or Amend Judgment brought under Rule 59(e). *See* FED. R. CIV. PROC. 59(a), (e). The Fifth Circuit Court of Appeals has instructed that the Federal Rules favor denial of motions to alter or amend a judgment. *See Southern Contractors Group, Inc. v. Dynaleetric Company*, 2 F.3d 606, 611 (5th Cir. 1993). Reconsideration of a judgment after its entry is an extraordinary remedy that should be used sparingly. *Templet v. Hydrochem Inc.*, 367 F.3d 473, 478-79 (5th Cir. 2004). In order to be considered, a motion to alter or amend a judgment must clearly establish either a manifest error of law or fact or must present newly discovered evidence; it cannot be used to raise arguments which could, and should, have been made before the judgment issued. *Rosenzweig v. Azurix Corp.*, 332 F.3d 854, 863 (5th Cir. 2003); *Simon v. United States*, 891 F.2d 1154, 1159 (5th Cir. 1990).

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In Plaintiff's Motion for New Trial and Motion for Reconsideration (hereinafter Plaintiff's "Motion"), Plaintiff merely reasserts arguments that were extensively briefed in the summary judgment pleadings, or that could have been raised before judgment, and then conclusorily states that this Court erred in making its determinations on these issues. Furthermore, to the extent that Plaintiff argues that manifest errors exist, her arguments are not premised upon any legal or factual authority whatsoever. Jones Day expressly incorporates by reference its previously-filed summary judgment pleadings and evidence supporting this Court's grant of summary judgment. This Court has already considered and rejected Plaintiff's arguments opposing summary judgment, and Plaintiff has no basis upon which to establish a manifest error of law or fact in this Court's judgment. Because Plaintiff's Motion does not present new evidence warranting this Court's reconsideration of its judgment and does not establish any manifest errors of law or fact, Plaintiff's Motion for New Trial and Motion for Reconsideration should be denied.

**1. There is no evidence that Plaintiff suffered any adverse employment action before September 2003.**

In support of her Motion, Plaintiff argues, without legal or evidentiary support, that the employment decision at issue occurred when Jones Day made the decision to demote Plaintiff in February 2003. Plaintiff's argument fails for several reasons. First, there is no evidence that Jones Day made any decision regarding the GIS Manager position in February 2003. Rather, the undisputed summary judgment evidence shows that Jones Day did not ultimately decide to create a new GIS position in Houston until September 2003 (*See*, *e.g.*, Affidavit of Hugh Whiting, attached to Defendant's Motion for Summary Judgment as Exhibit C, at ¶ 4; Deposition of Kevin Richardson, attached to Defendant's Motion for Summary Judgment as Exhibit B, at 89). It is undisputed that Hugh Whiting, Partner-in-Charge of the Houston Office, made the ultimate

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decision to hire a new GIS employee in Houston (*See*, *e.g.*, Defendant's Ex. C at ¶4). Houston Office Administrator Kevin Richardson testified that the only conversations he had with Whiting prior to September 2003 regarding Houston GIS personnel concerned whether it was necessary to hire a new GIS employee at that time (Defendant's Ex. B at 94-95). Ultimately, in or around September 2003, due to the growing demands of the office, Whiting decided that Jones Day needed to create a GIS Manager position in Houston (Defendant's Ex. C at ¶4).

The only evidence that Plaintiff cites in support of her assertion that the decision occurred before September 2003 is a February 3, 2003 email from North American GIS Manager Sara White to Richardson, in which White discusses the *possibility* of creating a new GIS position in Houston (*See* Plaintiff's Opposition to Summary Judgment at Exhibit 5). As Richardson explained, White's email merely reflected the concerns that Jones Day had with the current operations of the Houston GIS Department (*See* Defendant's Ex. B, at 27). It did not reflect any affirmative decision to create a new position, because such a decision had not yet been made (*See id*.). Because there is no evidence in the summary judgment record to indicate that Jones Day decided to demote Plaintiff in February 2003, or at any time prior to September 2003, Plaintiff cannot demonstrate that the Court committed clear error by holding that the adverse employment action at issue occurred in September 2003. Moreover, if the adverse employment action at issue had occurred before February 3, 2003, as Plaintiff now asserts, Plaintiff's claims would be time-barred.[1]

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[1] Plaintiff contends that the alleged adverse employment action at issue occurred before White's February 3, 2003 email. Plaintiff filed her charge of discrimination on December 11, 2003, 311 days after the date of White's email. Accordingly, if the adverse employment decision had occurred before February 3, 2003, as Plaintiff now asserts, Plaintiff's charge would not have been timely filed. TEX. LAB. CODE § 21.202. Furthermore, because Plaintiff filed her lawsuit in April 2005, more than two years after the alleged February 2003 decision, her § 1981 claim would also be barred. *See Price v. Digital Equipment Corp.*, 846 F.2d 1026 (5th Cir. 1988) (holding that a two-year statute of limitations applies to § 1981 wrongful termination claims).

Second, even if this Court could conclude that Jones Day decided in February 2003 to create a new GIS position in Houston, there is no evidence that Jones Day made any decision with respect to Plaintiff's employment before September 2003. On the contrary, Richardson testified that he never had any discussions about Plaintiff's qualifications for the GIS Manager position prior to September of 2003 (Defendant's Ex. B, at 94). There is simply no evidence in the summary judgment record suggesting that any decision to "demote" Plaintiff occurred concurrently with the decision to create the new GIS position. Instead, Plaintiff was invited to apply for, and did apply for, the GIS Manager position (*Id*. at 114-15; Defendant's Ex. C at ¶4). The summary judgment evidence conclusively establishes that to the extent any demotion decision occurred in this case, it was made contemporaneously with the promotion of Jerry Del Riesgo to GIS Manager.

Finally, Plaintiff has no legal basis upon which to argue that she suffered an adverse employment action in February 2003. Plaintiff cites no authority for the proposition that an alleged adverse employment action occurs at the time the internal business decision is made rather than when it is implemented. Even assuming *arguendo* that the alleged demotion decision at issue occurred in February of 2003, as Plaintiff contends, there is no dispute that Plaintiff's job duties, compensation, and benefits were not altered in any way until *after* Jerri Del Riesgo was hired as Houston GIS Manager. Accordingly, the decision does not constitute an adverse employment action under Title VII because the terms and conditions of Plaintiff's employment did not change in February 2003. *Hunt v. Rapides Healthcare Sys., L.L.C.*, 277 F.3d 757, 769 (5th Cir. 2001) (holding that an employment action that "does not affect job duties, compensation, or benefits" is not an adverse employment action under Title VII). Because Plaintiff did not suffer an allegedly adverse employment action until September 2003, and because there is no competent evidence that the employment action at issue was motivated by discrimination, this Court did not err in granting Jones Day's Motion for Summary Judgment.

**2. Jones Day has articulated a legitimate, nondiscriminatory reason for the employment action at issue, and there is no evidence of pretext.**

As this Court properly recognized, Jones Day met its burden on summary judgment to articulate a legitimate, nondiscriminatory reason for Plaintiff's alleged demotion. Specifically, as fully explained in Defendant's Motion, the undisputed summary judgment evidence demonstrates that Jones Day hired Del Riesgo as Houston GIS Manager because Jones Day determined that Del Reisgo was better qualified than Plaintiff for the manager position. Because the terms and conditions of Plaintiff's employment did not change until Del Riesgo took over the Houston GIS Manager responsibilities, the alleged demotion at issue did not occur until Jones Day selected Del Riesgo for the position. Because Jones Day articulated a legitimate, nondiscriminatory reason for selecting Del Riesgo as Houston GIS Manager, this Court did not err in granting Jones Day's Motion for Summary Judgment.

Moreover, even if this Court could conclude that the adverse employment decision at issue occurred when Jones Day decided to create a new GIS position in Houston, the summary judgment record clearly reflects Jones Day's legitimate, nondiscriminatory reasons for this decision. As the undisputed evidence demonstrates, Jones Day elected to create a new GIS position in Houston because of the growing demands of the office and the office's anticipated relocation scheduled for the end of 2003 (*See*, *e.g.*, Defendant's Ex. B, at 16-17; Defendant's Ex. C at ¶4). Furthermore, the record establishes that Plaintiff had not demonstrated the performance qualities sufficient to perform in the capacity of GIS Manager (*See*, *e.g.*, Defendant's Ex. B at 94; Defendant's Ex. I at Ex. 3, pp. 25-34), and that Jones Day concluded that Del Riesgo would perform better in the position of GIS Manager than Plaintiff (Defendant's Ex. C at ¶6). An employer's decision to demote an employee for unsatisfactory performance is a legitimate, nondiscriminatory reason for the employment decision. *Crawford v. Formosa Plastics Corp.*, 234 F.3d 899, 902 (5th Cir. 2000). Moreover, as this Court properly recognized, Title VII does not prohibit an employer from discharging an employee, even one who is performing her current position adequately, and replacing her with an individual outside the plaintiff's protected class whom the employer subjectively believes will do a better job. *See Elliott v. Group Med. & Surgical Serv.*, 714 F.2d 556, 567 (5th Cir. 1983), *cert. denied*, 467 U.S. 1215 (1984). The undisputed summary judgment evidence in this case definitively establishes that Jones Day had legitimate, nondiscriminatory reasons for the decisions at issue.

Finally, Plaintiff cannot demonstrate that the Court erred in granting Jones Day's Motion for Summary Judgment because Plaintiff has no evidence that Jones Day's legitimate, nondiscriminatory reasons for its GIS personnel decisions are false or merely a pretext for discrimination. Plaintiff presents no arguments of pretext that were not extensively briefed prior to this Court's grant of summary judgment. While Plaintiff argues that the majority of Richardson's criticisms of Plaintiff's performance occurred after the demotion decision was allegedly made, there is no evidence that Richardson's evaluations of Plaintiff were motivated by discrimination. Furthermore, Plaintiff ignores the undisputed fact that she received unfavorable employment evaluations from other Jones Day employees in 2002 as well as 2003, and that Whiting relied on all of these evaluations in deciding to promote Del Riesgo to the GIS Manager position (*See* Defendant's Ex. I at Ex. 3, pp. 25-34; Defendant's Ex. C at ¶5). Finally, Plaintiff's allegation that Jones Day discriminated against her when *Richardson* decided to demote her completely disregards the testimony of Whiting, the undisputed ultimate decision maker, and of Mark Metts and Scott Cowan, who both provided input into the GIS Manager hiring decision.

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Plaintiff does not argue that any of these individuals acted with a discriminatory motive in recommending or selecting Del Riesgo for the GIS Manager position. Because Plaintiff offers nothing more than conclusory arguments and self-interested characterizations of job performance in support of her Motion, Plaintiff cannot demonstrate that the Court committed clear error in holding that there was no evidence of discrimination by Jones Day. Accordingly, Plaintiff's Motion should be denied.

## III. CONCLUSION

For the above-stated reasons, Jones Day prays that the Court deny Plaintiff's Motion for New Trial and Motion for Reconsideration. Jones Day further requests all other and further relief, at law or in equity, to which it may show itself to be justly entitled.

Respectfully submitted,

/s/ Shauna Johnson Clark by permission
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**CERTIFICATE OF SERVICE**

This pleading was served in compliance in compliance with Rule 5 of the Federal Rules of Civil Procedure by electronic transmission on this 9th day of February, 2007, to counsel listed below:

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